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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JORGE SANTOS,

12 Plaintiff,

13 vs.

14 DAVID G. SMITH, DAVE KHATRI and
15 SUNIL WALIA,

16 Defendants.

CASE NO. 07CV0001-LAB (RBB)

**ORDER ADOPTING REPORT
AND RECOMMENDATION**

[Docket no. 10]

17 Plaintiff, a prisoner proceeding *pro se*, seeks relief pursuant to 42 U.S.C. § 1983 for
18 alleged violations of his Eighth Amendment rights. Plaintiff suffered a leg injury before being
19 incarcerated and continues to suffer leg and back problems. Defendant Smith is a physician
20 who treated him. The complaint was filed *nunc pro tunc* to December 22, 2006.

21 Defendant Smith moved, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss all claims
22 against him. Pursuant to 28 U.S.C. § 636 and Civil Local Rule 72.1(d), this matter was
23 referred to Magistrate Judge Ruben Brooks. On December 21, 2007, Judge Brooks issued
24 his report and recommendation (the "R&R") recommending dismissing all claims against
25 Defendant Smith. The R&R required the parties, if they wished to object, to serve and
26 file their objections no later than January 31, 2008. (R&R at 18:4–5.) The R&R also
27 informed them that failure to object within the time permitted might waive their appellate
28 rights. (*Id.* at 18:6–8.) Plaintiff filed his objections, to which Defendant Smith filed a reply.

1 A district judge “may accept, reject, or modify the recommended decision, receive
2 further evidence, or recommit the matter to the magistrate judge with instructions” on a
3 dispositive matter prepared by a magistrate judge proceeding without the consent of the
4 parties for all purposes. Fed. R. Civ. P. 72(b); see *also* 28 U.S.C. §636(b)(1). A party
5 objecting to the recommended disposition of the matter may “serve and file specific
6 objections to the proposed findings and recommendations,” and “a party may respond to
7 another party’s objections.” Rule 72(b). “[T]he court shall make a de novo determination of
8 those portions of the report or specified proposed findings or recommendations to which
9 objection is made.” 28 U.S.C. §636(b)(1).

10 Plaintiff’s objections are essentially a brief restatement of his allegations. The
11 complaint, and exhibits submitted with it, show Defendant Smith listened to Plaintiff’s
12 complaints and provided Plaintiff with treatments, albeit not the treatments Plaintiff believed
13 he needed. Mere disagreement over which of two medically acceptable courses of
14 treatments should be followed cannot give rise to a claim for deliberate indifference to
15 serious medical needs. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996). For the most
16 part, Plaintiff has failed to allege that the course Defendant Smith followed was medically
17 unacceptable.

18 In at least one case, Plaintiff has alleged Defendant Smith acted in a manner that
19 could be considered medically unacceptable. Following surgery for removal of a plate and
20 screws from Plaintiff’s leg, Defendant Smith saw Plaintiff for a follow-up examination.
21 (Compl. at 40.) He then ordered a second follow-up examination the following month. (*Id.*)
22 Plaintiff was eventually seen eleven months later, at which time he complained of back
23 problems. (*Id.* at 17.) Plaintiff also identifies delays in receiving treatment Defendant Smith
24 had ordered.

25 In all cases, Plaintiff fails to allege facts to show Defendant Smith was deliberately
26 indifferent to his serious medical needs. There is no allegation Defendant Smith intentionally
27 delayed treatment, or that he deliberately caused Plaintiff any harm. Some of the allegations
28 might support a finding of negligence; but mere negligence, even gross negligence, does not

1 suffice to state a claim under § 1983 for deliberate indifference. *Farmer v. Brennan*, 511
2 U.S. 825, 835, 839 (1994).

3 Plaintiff objects to two general points not addressed by the R&R. First, he says he
4 brought his back pain to Defendant Smith's attention in 2000 but instead of evaluating his
5 back pain, Dr. Smith simply prescribed back exercises. (Obj. to R&R at 3:21–24.) He does
6 not reference any allegations in the complaint, but cites to an exhibit which appears to be
7 an informational booklet explaining to patients how to prevent a recurrence of back pain.
8 Whatever this allegation relates to, it falls well outside the period of in which he alleges Smith
9 treated him. (See Compl. at ¶ B(1) (alleging the events giving rise to his claims occurred in
10 2005).)

11 Second, Plaintiff mentions actions by Defendants Khatri and Walia. (Obj. to R&R at
12 2:23–26, 3:13–17.) These Defendants have not moved for dismissal, and it is unclear how
13 Plaintiff's allegations concerning their actions relate to his claims against Defendant Smith.

14 The court has conducted a de novo review of those portions of the R&R objected to
15 and finds its conclusions to be correct. Plaintiff's objections are therefore **OVERRULED**.
16 The only portion of the R&R the Court finds to be in need of modification is the standard for
17 motions to dismiss. The R&R cites *Hughes v. Rowe*, 449 U.S. 5, 10 n.7 (1980) for the “no
18 set of facts” standard. This was originally handed down in *Conley v. Gibson*, 355 U.S. 41,
19 45–46 (1957), but this standard was recently abandoned in *Bell Atlantic Corp. v. Twombly*,
20 127 S.Ct. 1955, 1969 (2007). The R&R is therefore modified to incorporate the *Bell Atlantic*
21 standard. This modification does not alter the R&R's analysis, however. The R&R is
22 **ADOPTED AS MODIFIED**.

23 “Unless it is absolutely clear that no amendment can cure the defect . . . , a *pro se*
24 litigant is entitled to notice of the complaint's deficiencies and an opportunity to amend prior
25 to dismissal of the action.” *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995); *see also*
26 *Lopez v. Smith*, 203 F.3d 1122, 1126 (9th Cir.2000) (en banc). Plaintiff has not yet had an
27 opportunity to amend his complaint to correct the deficiencies.

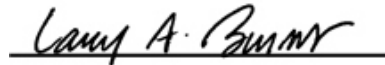
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1 For reasons explained in the R&R, Plaintiff's claims against Defendant Smith are
2 **DISMISSED WITHOUT PREJUDICE.** If Plaintiff wishes to file an amended complaint
3 remedying these deficiencies, he may do so no later than **30 calendar days from the date**
4 **this order is issued.** Plaintiff is cautioned that his amended complaint must be complete
5 in itself, without reference to the original complaint. If he chooses to file an amended
6 complaint, he is directed to review Civil Local Rule 15.1 and to comply with its requirements.
7 Any claims omitted from the amended complaint will be deemed abandoned.

8 Plaintiff is advised that if he fails to correct the deficiencies the R&R identifies in his
9 claims against Defendant Smith within the time permitted, his claims against Smith will be
10 dismissed with prejudice.

11 **IT IS SO ORDERED.**

12 DATED: March 17, 2008

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14 **HONORABLE LARRY ALAN BURNS**
15 United States District Judge
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